INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Interest of the United States	3
Statement	4
A. The district court's decision	5
B. The court of appeals' decision	6
Summary of argument	8
Argument:	
The Securities Exchange Act of 1934 does not exempt from the Sherman Act the fixing of commission rates by registered securities exchanges, except to the extent that a court determines that such exemption is necessary to make the Securities Exchange Act work	10
A. The fixing of standard rates of commission by securities exchanges is illegal *per se* unless justified by the requirements of the Securities Exchange Act as determined by the antitrust courts	11
B. Under *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, a full record should have been developed for application of the *Silver* test	17
1. The *Silver* case	17
2. The *Ricci* case	20
3. The need for a full record	24

567-303—75——1

Argument—Continued
C. Neither the language and structure of the Act nor its legislative history indicates that exclusive jurisdiction over exchange price-fixing is vested in the SEC ... 26
1. The language and structure of the Act ... 26
2. The legislative history ... 29
D. In the absence of clear legislative intent, the court of appeals had no basis from which to infer that the SEC has exclusive jurisdiction over price fixing ... 35
1. No pervasive regulatory scheme is substituted for price competition ... 35
2. No exemption by Section 19(b)(9) or by registration of exchanges ... 37
3. Antitrust jurisdiction complements regulation ... 43
4. Legislative awareness of exchange price fixing ... 47
5. Inconsistent results ... 48
6. Fixed commission rates as a keystone of the marketing system ... 51
7. "Chilling" exchange self-regulation ... 55
Conclusion ... 56
Appendix ... 57

DARK PAGE BLEED THRU

CITATIONS

Cases:

	Page
Abbott Securities Corp. v. *New York Stock Exchange*, 1974–2 Trade Cases, ¶75,324 (D.C.D.C., decided October 30, 1974)	15
American Telephone & Telegraph Co. v. *Federal Communications Commission*, 487 F. 2d 865	16–17
American Telephone and Telegraph Co. v. *Federal Communications Commission*, 503 F. 2d 612	16, 38
Arizona Grocery v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370	39
Associated Press v. *United States*, 326 U.S. 1	11
Baird v. *Franklin*, 141 F. 2d 238, certiorari denied, 323 U.S. 737	27, 46
Board of Trade of the City of Chicago v. *United States*, 246 U.S. 231	27
California v. *Federal Power Commission*, 369 U.S. 482	14, 16, 22, 50
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213	12, 14, 17, 22, 37, 43, 55
Chevron Oil Co. v. *Huson*, 404 U.S. 97	55
Denver & R.G.W.R. Co. v. *United States*, 387 U.S. 485	50
Federal Baseball Club v. *National League*, 259 U.S. 200	48
Federal Maritime Commission v. *Svenska Amerika Linien*, 390 U.S. 238	50
Fredrickson v. *Merrill Lynch, Pierce, Fenner & Smith*, 1974–2 Trade Cases, ¶75,227 (N.D. Ill., decided September 9, 1974), appeal pending (C.A. 7)	15, 24
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439	11–12, 14, 39

Cases—Continued

Page

Girouard v. *United States*, 328 U.S. 61 47
Greater Boston Television Corp. v. *Federal Communications Commission*, 444 F. 2d 841 .. 46
Gulf States Utilities Co. v. *Federal Power Commission*, 411 U.S. 747 50
Hartford-Empire Co. v. *United States*, 323 U.S. 386 54
Harwell v. *Growth Programs, Inc.*, 451 F. 2d 240, rehearing denied, 459 F. 2d 461, certiorari denied *sub nom. National Ass'n of Securities Dealers, Inc.* v. *Harwell*, 409 U.S. 876 ..... 15, 24, 26, 34–35, 45
Independent Broker-Deal. T. Ass'n v. *Securities & Exchange Commission*, 442 F. 2d 132, certiorari denied, 404 U.S. 828 40
Independent Investor Protective League v. *Securities and Exchange Commission*, S.D.N.Y., No. 71–1924, dismissed without opinion, November 15, 1971 41
International Ass'n of Machinists v. *Street*, 367 U.S. 740 34
J. I. Case Co. v. *Borak*, 377 U.S. 426 45
Kaplan v. *Lehman Bros.*, 371 F. 2d 409, certiorari denied, 389 U.S. 954 ..... 24, 25
Keogh v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 12
Maple Flooring Mfrs. Ass'n v. *United States*, 268 U.S. 563 12
Maryland & Virginia Milk Producers v. *United States*, 362 U.S. 458 22
Merrill Lynch, Pierce, Fenner & Smith v. *Ware*, 414 U.S. 117 ..... 13, 29
National Labor Relations Board v. *Plasterers' Union*, 404 U.S. 116 47
Otter Tail Power Co. v. *United States*, 410 U.S. 366 ..... 14, 16, 37, 48, 50

Cases—Continued

	Page
Pan American World Airways v. *United States*, 371 U.S. 296	16, 22, 37
Parker v. *Brown*, 317 U.S. 341	48
PBW Stock Exchange, Inc. v. *Securities and Exchange Commission*, 485 F. 2d 718, certiorari denied, 416 U.S. 969	31, 49
Poller v. *Columbia Broadcasting System*, 368 U.S. 464	26
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289, affirming 447 F. 2d 713	2, 9, 14, 15, 17, 24, 44, 55
Scheuer v. *Rhodes*, 416 U.S. 232	26
Silver v. *New York Stock Exchange*, 373 U.S. 341	*passim*
Silver v. *New York Stock Exchange*, 196 F. Supp. 209, reversed, 302 F. 2d 714, reversed, 373 U.S. 341	18, 28
Simpson v. *Union Oil Co.*, 396 U.S. 13	55
Sugar Institute v. *United States*, 297 U.S. 553	12
Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264, certiorari denied, 401 U.S. 994, after remand, 469 F. 2d 14	8, 15, 16, 24, 25
United States v. *Aluminum Co. of America*, 91 F. Supp. 333	54
United States v. *Borden Co.*, 308 U.S. 188	14, 22, 32, 43, 48, 55
United States v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316	54
United States v. *Joint Traffic Association*, 171 U.S. 505	12
United States v. *Morgan*, 313 U.S. 409	46
United States v. *Morgan*, 118 F. Supp. 621	34
United States v. *National Ass'n of Real Estate Boards*, 339 U.S. 485	11, 48

Cases—Continued
United States v. *Pacific and Arctic Ry. and Nav. Co.*, 228 U.S. 87 14
United States v. *Philadelphia National Bank*, 374 U.S. 321 ..... 14, 16, 22, 43, 55
United States v. *Radio Corp. of America*, 358 U.S. 334 ..... 14, 22
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 ..... 34, 43
United States v. *Terminal R. Ass'n of St. Louis*, 224 U.S. 383 ..... 11, 24, 48
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290 ..... 12, 14
United States v. *Trenton Potteries Co.*, 273 U.S. 392 ..... 11, 47
White Motor Co. v. *United States*, 372 U.S. 253 26
Zuckerman v. *Yount*, 362 F. Supp. 858 15
Statutes:
Clayton Act, 38 Stat. 730, *et seq.*:
Section 4, 15 U.S.C. 15 72
Section 16, 15 U.S.C. 26 72
Commodity Exchange Act, 42 Stat. 998, as amended, 7 U.S.C. 1, *et seq.* 15, 21
Communications Act of 1934, Section 221(a), 48 Stat. 1080, as amended, 47 U.S.C. 221(a) 31
Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 5
Securities Exchange Act of 1934, 48 Stat. 881, *et seq.*, as amended, 15 U.S.C. 78a, *et seq.* 11, 57
Section 2, 15 U.S.C. 78b 3, 27, 57
Section 3(a)(1), 15 U.S.C. 78c(a)(1) 11
Section 3(a)(3), 15 U.S.C. 78c(a)(3) 5
Section 5, 15 U.S.C. 78e 27, 59
Section 6, 15 U.S.C. 78f 27, 41, 42, 59
Section 6(b), 15 U.S.C. 78f(b) 2, 12, 28, 41, 42
Section 6(d), 15 U.S.C. 78f(d) 2, 12, 28, 41, 42
Section 7, 15 U.S.C. 78g 29

Statutes—Continued Page
Section 8, 15 U.S.C. 78h 29
Section 10, 15 U.S.C. 78j 29
Section 10(a), 15 U.S.C. 78j(a) 29
Section 10(b), 15 U.S.C. 78j(b) 29, 45
Section 11, 15 U.S.C. 78k .....
Section 11(a), 15 U.S.C. 78k(a) 29
Section 11(b), 15 U.S.C. 78k(b) 29
Section 12(f), 15 U.S.C. 78*l*(f) 32
Section 14(a), 15 U.S.C. 78n(a) 45
Section 15A, 15 U.S.C. 78*o*–3(a)–(n) (the Maloney Act): 32–33, 45, 61
Section 15A(b), 15 U.S.C. 78*o*–3(b) 33
Section 15A(b)(8), 15 U.S.C. 78*o*–3(b)(8) 33
Section 15A(g), 15 U.S.C. 78*o*–3(g) 34
Section 15A(k), 15 U.S.C. 78*o*–3(k) 34
Section 15A(n), 15 U.S.C. 78*o*–3(n) 34, 35, 45
Section 19, 15 U.S.C. 78s 42, 43, 68
Section 19(a), 15 U.S.C. 78s(a) 28, 45
Section 19(b), 15 U.S.C. 78s(b) ..... *passim*
Section 19(b)(9), 15 U.S.C. 78s(b)(9) ..... *passim*
Section 19(d), 15 U.S.C. 78s(d) 39
Section 21(a), 15 U.S.C. 78u(a) 40
Section 25(a), 15 U.S.C. 78y(a) 31
Section 28, 15 U.S.C. 78bb 8, 41, 70
Section 32, 15 U.S.C. 78ff 45
Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*: 3
Section 1, 15 U.S.C. 1 ..... 5, 71
Section 2, 15 U.S.C. 2 ..... 5, 71
Congressional:
78 Cong. Rec. 8090–8091 31
78 Cong. Rec. 8591–8592 31
119 Cong. Rec. S11368–S11387 (daily ed., June 18, 1973) 44

Congressional—Continued Page

120 Cong. Rec. S8950–S8958 (daily ed. May 28, 1974) 45
H.R. 5050, 93d Cong., 1st Sess. 44, 52
H.R. 7852, 73d Cong., 2d Sess. 30
H.R. 9323, 73d Cong., 2d Sess. 30, 31
H. Rep. No. 93–1476, 93d Cong., 2d Sess. 44, 52
H. Rep. No. 1383, 73d Cong., 2d Sess. 30
H. Rep. No. 1593, 62d Cong., 3d Sess. 30, 48
Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess. 30
Hearings before the Senate Committee on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), 73d Cong., 1st and 2d Sess. 30, 31, 32
Letter from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, 73d Cong., 2d Sess. (Committee Print) 29
Letter of Hon. Manuel F. Cohen, Chairman, Securities and Exchange Commission, to the Honorable A. Willis Robertson, Chairman, Committee on Banking and Currency, U.S. Senate, July 30, 1965, 111 Cong. Rec. 19021 36
Letter of SEC Chairman Casey to Chairman Harrison A. Williams, Jr., Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, December 3, 1971, Hearings before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs on S. 3169, Stock Exchange Commission Rates, 92d Cong., 2d Sess. 52

Congressional—Continued Page

Letter of SEC Chairman Casey to the President of the Senate, December 28, 1971, transmitting SEC Study of Unsafe and Unsound Practices of Brokers and Dealers, H. Doc. No. 92–231, 92d Cong., 1st Sess.... 38

Letter of SEC Chairman Cook to Chairman Harrison A. Williams, Jr., Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, April 10, 1973.. 52

S. 470, 93d Cong., 1st Sess..... 44, 52

S. 2519, 93d Cong., 1st Sess..... 44

S. 2693, 73d Cong., 2d Sess..... 30

S. 3420, 73 Cong., 2d Sess..... 30

S. Rep. No. 93–187, 93d Cong., 1st Sess..... 44, 52

S. Rep. No. 93–865, 93d Cong., 2d Sess..... 45

S. Rep. No. 1739, 74th Cong., 2d Sess..... 32

S. Rep. No. 792, 73d Cong., 2d Sess..... 30, 32

Securities Industry Study, Report of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (Subcommittee Print)..... 44–51

Securities Industry Study, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (Committee Print)..... 41

Securities Industry Study, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (Committee Print)..... 43–51

"Special Study of the Securities Markets," H. Doc. No. 95, 88th Cong., 1st Sess..... 39, 46

Congressional—Continued
Testimony of Commissioner Loomis, Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 5050 and H.R. 340, Securities Exchange Act Amendments of 1973, 93d Cong., 1st Sess., Part 2 ... 53
Miscellaneous:
Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 Stan. L. Rev. 675 (1970) ... 37, 53
17 C.F.R. 240.17a-8 ... 16
29 Fed. Reg. 3471 ... 16
II Loss, *Securities Regulation* (2d ed. 1961) ... 34, 48
III Loss, *Securities Regulation* (2d ed. 1961) ... 45
Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange*, 80 Yale L.J. 811 (1971) ... 39
In the Matter of the Rules of the New York Stock Exchange, 10 S.E.C. 270 ... 49, 50
Securities Exchange Act Release No. 5889 (1959) ... 39
Securities Exchange Act Release No. 9007 (October 22, 1970) ... 40
Securities Exchange Act Release No. 9950 (January 16, 1973) ... 49
Securities Exchange Act Release No. 10206 (June 6, 1973) ... 40
Securities Exchange Act Release No. 10383 (September 11, 1973) ... 40
Securities Exchange Act Release No. 10670 (March 7, 1974) ... 40
Securities Exchange Act Release No. 11073 (October 24, 1974) ... 41

Miscellaneous—Continued

Page
Securities Release Act Release No. 11203 (January 23, 1975) 39, 40, 50, 52
Securities Exchange Commission, First Annual Report (1935) 42
Securities and Exchange Commission, Statement on the Future Structure of the Securities Market (February 2, 1972) 40
Tracy and McChesney, *The Securities Exchange Act of 1934*, 32 Mich. L. Rev. 1025 (1934) 47

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-304

RICHARD A. GORDON, ETC., PETITIONER

v.

NEW YORK STOCK EXCHANGE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35–51) is reported at 498 F.2d 1303. The opinion of the district court (Pet. App. 21–34) is reported at 366 F. Supp. 1261.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1974. The petition for a writ of certiorari was filed on September 19, 1974, and was granted on November 18, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). *Silver* v. *New York Stock*

Exchange, 373 U.S. 341; *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289.

QUESTION PRESENTED

Section 6(b) and (d) of the Securities Exchange Act of 1934 imposes a duty of self-regulation upon registered securities exchanges by requiring them to adopt rules to enforce just and equitable principles of trade, to insure fair dealing and to protect investors. Section 19(b) of the Act empowers the Securities and Exchange Commission to require changes in such rules where necessary or appropriate for the protection of investors, to assure fair dealing in securities transactions, or to insure fair administration of the exchange. Section 19(b)(9) includes, among the matters subject to this power, "the fixing of reasonable rates of commission, interest, listing, and other charges."

The question the United States will discuss is whether these provisions, on their face, repeal by implication the otherwise applicable antitrust laws; or whether such repeal exists only insofar as a court finds that particular instances of price fixing are necessary, but no more restrictive than necessary, to make the scheme of the Securities Exchange Act work.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, the Clayton Act, and the Securities Exchange Act of 1934, are set forth in the appendix *infra,* pp. 57–72.

INTEREST OF THE UNITED STATES

The United States, through the Attorney General and the Department of Justice, has primary responsibility for enforcing the Sherman Act, 15 U.S.C. 1, *et seq.*, which expresses the nation's fundamental economic policy in favor of free competition. This case raises an important question concerning the application of that Act to collective price fixing by members of the nation's securities exchanges. These exchanges are the principal marketplaces for investors in the private enterprise system. Upon their functioning as efficient, liquid markets depends, in significant part, the ability of private enterprise to raise capital. This vital function led Congress in 1934 to declare that securities exchanges "are affected with a national public interest." Section 2, Securities Exchange Act of 1934, as amended, 48 Stat. 881, 15 U.S.C. 78b.

Studies of the securities industry in the last decade have raised serious questions whether the exchanges' practice of setting fixed commission rates by agreement among members who execute transactions for investors and non-member brokers, should be tolerated as an exception to the policy of competition enforced in all other sectors of the economy. It has been contended in antitrust courts, proceedings before the Securities and Exchange Commission ("SEC"), and in testimony before Congress, that fixed commission rates subsidize inefficiency, fragment market trading, promote evasion of the price fixing scheme by large institutional investors and others with economic lever-

age, impose substantial and unnecessary costs on the investing public, and thereby discourage investment in securities traded on the exchanges to the detriment of the effectiveness and liquidity of those markets. If the Sherman Act does not apply to such market places, located as they are at the heart of our system of private capitalism, it can only be because Congress has consciously made such a decision. We do not find in the language, structure or history of the 1934 Act, or in the assumptions of the court of appeals concerning the wisdom of fixed commission rates, any basis for concluding that the 1934 Act, on its face, rendered the antitrust laws inapplicable to exchange price-fixing.

This Court's decision in this case will have a significant impact upon the application of the antitrust laws to the securities industry, and on the method for determining their application to other regulated industries as well. The United States, therefore, is vitally concerned with the way this Court decides the issue.

STATEMENT

Petitioner Gordon filed a complaint in the United States District Court for the Southern District of New York in January 1971, on behalf of himself, the Independent Investors Protective League, and an alleged class of "small investors" who purchase stocks listed on the New York Stock Exchange and the American Stock Exchange in amounts of less than $500,000 per purchase. (App. A–8).[1] Both exchanges

[1] "App." refers to the Appendix filed by petitioner.

were named as defendants. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Bache & Co. were also named as defendants, both individually and as representatives of an alleged class composed of members of the New York and American Stock Exchanges. The complaint alleged that the respondents are violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and the Robinson-Patman Act, 15 U.S.C. 13; and prayed for treble damages and injunctive relief.

A. THE DISTRICT COURT'S DECISION

The district court granted the respondents' motion for summary judgment on December 3, 1973, without determining whether the plaintiff or defendant classes are properly constituted (Pet. App. 34). That court construed the complaint as alleging "claims regarding the Exchanges' practice of limiting the number of memberships, and denying the use of their facilities to nonmembers unless they pay the same rate of commission charged the general public" (Pet. App. 23), that the respondents violated the Robinson-Patman Act by adopting discriminatory commission rates (Pet. App. 24); and that they violated the Sherman Act by fixing commission rates (Pet. App. 25).

The district court concluded that petitioner lacks standing to challenge the memberships limitation because he is not an injured person, that the fee preference for exchange members is authorized by Section 3(a)(3) of the Securities Exchange Act, 15 U.S.C. 78c(a)(3), and that the Robinson-Patman Act is not applicable to discrimination in the pricing of broker-

567-203—75——2

age services (Pet. App. 23–24). The court of appeals characterized these claims as "frivolous" (Pet. App. 38) and they were not discussed in the petition for a writ of certiorari.[2] Accordingly, the proceeding in this Court involves only the dismissal of the complaint insofar as it alleges that the respondents have violated the Sherman Act by fixing the commission rates for stock transactions on the exchanges, seeks to recover damages for such rate-fixing, and seeks to enjoin the respondents from fixing such commission rates in the future.

The respondents did not deny that both exchanges have adopted rules establishing minimum commission rates for stock transactions on the exchanges. The district court held that it "lacks jurisdiction to entertain an antitrust attack on the commission structure of the Exchanges" because Section 19(b)(9) of the Securities Exchange Act "expressly directs the SEC to supervise the 'fixing of reasonable rates of commission' * * *" (Pet. App. 26).

B. THE COURT OF APPEALS' DECISION

The Court of Appeals for the Second Circuit affirmed the dismissal of petitioner's price-fixing claim. It noted that this Court had examined the application of the antitrust laws to securities exchanges in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, and had declared that repeal of the antitrust laws "is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.* at 357 (Pet.

[2] The petition does not set forth the "Questions Presented". Therefore, the questions must be inferred from its text.

App. 39). The court said, however, that this case "* * * is *toto caelo* different from *Silver* * * *" (Pet. App. 39). It noted that Section 19(b)(9) expressly vests oversight of the fixing of rates of commission in the SEC; that Congress considered SEC-supervised exchange self-regulation to be an essential element in the scheme of the 1934 Act; and that the Act "explicitly provides for 'the *fixing* of reasonable rates of commission,'" despite this Court's holding seven years earlier in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, that price fixing is a *per se* violation of the Sherman Act (Pet. App. 42–43). The court declared that "[i]f the discussion in *Silver* of a core of exchange self-regulation necessary to make the 1934 Act work, and thus immune from application of the antitrust laws, is to be given any meaningful application, we are of the view that it must have reference to the practices enumerated in § 19(b), and in this instance to the fixing of reasonable rates of commission" (Pet. App. 41). The court thus concluded that Section 19(b) vested exclusive jurisdiction over exchange rate fixing in the SEC.

It also stated that its conclusion was supported by sound policy. It expressed fear that the courts and the SEC might subject exchanges to "repetitive or conflicting standards," a hazard which it found to be confirmed by the "wide-reaching and systematic character of recent SEC action regarding rate regulation" (Pet. App. 44). In its view, although no record had been developed in the district court, there was "little question but that the commission rate structure is the keystone of the economic viability of the brokerage industry, and a matter of vital import-

ance to individual investors as well" (Pet. App. 44). It considered the SEC alone expert enough to reduce "the barriers to investor trading, while at the same time assuring a return sufficient to preserve brokerage capacity * * *" (*ibid.*). For, the court found, "[s]uch questions as the effect of fixed commission rates on trading volume and broker solvency, or the effect of competition on and the necessity for exchange membership, are not of the sort which courts can answer as well as the SEC" (Pet. App. 49).

The court expressly disagreed (Pet. App. 49–50) with *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994, which had reversed dismissal of a similar complaint and remanded it for a full trial under the criteria of the *Silver* decision.

SUMMARY OF ARGUMENT

Apart from any immunity provided by the Securities Exchange Act of 1934, the collective fixing of commission rates for brokerage services by members of the nation's securities exchanges is a *per se* violation of the Sherman Act. The 1934 Act contains no express exemption from the antitrust laws; its provisions are in addition to other remedies at law or in equity. 15 U.S.C. 78bb. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357, held that repeal of the antitrust laws is "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." This decision reflected the long line of authorities holding that regulation of aspects of an industry does not, of itself, oust antitrust jurisdiction.

ilver case the Securities and Exchange Com-
In the SEC) did not have specific authority to re-
mission (practices involved, although the Court as-
view the t it could have required the exchanges to
sumed thas establishing fair procedures for dealing
adopt rule practices. In *Ricci* v. *Chicago Mercantile*
with those 409 U.S. 289, 302, n. 13, this Court ruled
Exchange, egulatory conduct, arguably within the su-
that self-r uthority of the Commodity Exchange Com-
pervisory der a statute closely similar to the Secu-
mission u ange Act, was not for this reason immune
rities Exc Sherman Act. Rather, it held, the ultimate
from the ity for deciding whether the defense of
responsibil nder the regulatory act has been estab-
necessity ested in the antitrust courts. The record in
lished is v made on defendants' motion for summary
this case, is inadequate for determining this issue.
judgment,

The lan uage, structure and history of the 1934 Act
disclose a purpose to place primary responsibility for
self regul ation through internal rules on the ex-
changes, s bject to a reserved oversight by the SEC
under Sec ion 19(b). The Act thus does not create a
pervasive regulatory scheme which substitutes public
utility typ e regulation for competition, and the SEC
has never claimed power to exercise such regulation.
On the con trary, the availability of antitrust remedies
supplement ts the regulatory scheme; competition
makes mor e detailed regulation unnecessary. There is
no danger of duplicative or inconsistent requirements
arising fro m antitrust jurisdiction; the SEC itself has
directed a bolition of fixed commission rates.

ARGUMENT

THE SECURITIES EXCHANGE ACT OF 1934 DOES NOT EXEMPT FROM THE SHERMAN ACT THE FIXING OF COMMISSION RATES BY REGISTERED SECURITIES EXCHANGES, EXCEPT TO THE EXTENT THAT A COURT DETERMINES THAT SUCH EXEMPTION IS NECESSARY TO MAKE THE SECURITIES EXCHANGE ACT WORK

The position of the United States is that exchange rules embodying agreements fixing commission rates for brokerage services by members of securities exchanges are subject to scrutiny by antitrust courts under the Sherman Act, even though the SEC may also examine such rules under Section 19(b) of the Securities Exchange Act of 1934. Such rules are price-fixing agreements, and are exempted from the antitrust laws by the 1934 Act, only if, and to the minimum degree, necessary to make that Act work. The 1934 Act thus may create a defense analogous to the defense that an otherwise prohibited restraint is lawful because ancillary, and essential, to a legitimate joint venture. If the agreement fixing minimum commission rates is not necessary to effectuate the aims and purposes of the 1934 Act, the Sherman Act prohibits it.

Section 19(b) of the Securities Exchange Act gives the SEC supervisory authority over "the fixing of reasonable rates of commission" by securities exchanges, but not authority to decide whether the fixing of rates itself is exempt from the antitrust laws. The latter determination, which depends upon whether such rate fixing is necessary to make the 1934 Act work, must be made by an antitrust court.

This record is not adequate to permit a decision whether the latter determination requires invocation of the SEC's primary jurisdiction. Our submission is simply that the SEC does not have exclusive jurisdiction over that determination.

A. THE FIXING OF STANDARD RATES OF COMMISSION BY SECURITIES EXCHANGES IS ILLEGAL *PER SE* UNLESS JUSTIFIED BY THE REQUIREMENTS OF THE SECURITIES EXCHANGE ACT AS DETERMINED BY THE ANTITRUST COURTS

A securities exchange is a voluntary, private organization of individuals who deal in securities; it provides a market place or facilities for bringing together the purchasers and sellers of securities (15 U.S.C. 78c(a)(1)). The collective activities of exchange members affecting competition are subject to the antitrust laws, except to the extent Congress has otherwise provided. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 348, n. 5; *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R. Ass'n of St. Louis*, 224 U.S. 383. Apart from any immunity provided by the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, the collective fixing of commission rates for brokerage services is a *per se* violation of the Sherman Act. *United States* v. *National Ass'n of Real Estate Boards*, 339, U.S. 485, 488–489; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–228; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392.

Even in highly regulated industries, rate-fixing combinations not specifically authorized by law are *per se* violations; this is true even though the rates themselves have been approved, as reasonable, by a regulatory agency. *Georgia* v. *Pennsylvania R. Co.*, 324

U.S. 439, 457–459; *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 161–162; *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S. 505. And even where the law provides that rate-fixing agreements approved by an agency are exempt from the antitrust laws, when such agreements are implemented without such approval, they violate those laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213.

The Securities Exchange Act of 1934 ("the 1934 Act") contains no express provision empowering the SEC to grant immunity from the antitrust laws for rate-fixing combinations. It provides in Section 6(b) and (d) (15 U.S.C. 78f(b), (d)) for a system of self-regulation by exchanges, to be exercised through the private initiative of their members, subject to certain regulatory powers vested in the SEC. Any group of competing sellers, of course, may combine for the advancement of mutual interests so long as their activities are not in restraint of trade.[3] When such competitors are by statute required to engage in self-regulation, the requirement may result in collective actions which would otherwise violate the Sherman Act. In the absence of express immunity, however, "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy," *Georgia* v. *Pennsylvania R. Co.*, *supra*, 324 U.S. at 457.

In *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357, this Court held that the system of self-

[3] Compare *Maple Flooring Mfrs. Ass'n* v. *United States* 268 U.S. 563, with *Sugar Institute* v. *United States*, 297 U.S. 553.

regulation prescribed by the 1934 Act, and the national policy of competition expressed in the antitrust laws, were to be analyzed in a way "which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Accord, *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 127. Noting that the Securities Exchange Act contains no express exemption from the antitrust or other laws, and that any repeal of the antitrust laws would therefore depend on implication from the regulatory scheme, the Court ruled (373 U.S. at 357):

> Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

The court of appeals held this "guiding principle" inapplicable because Section 19(b)(9) of the Securities Exchange Act gives the SEC jurisdiction to modify exchange rules relating to the fixing of commissions. In its view, this jurisdiction is neither concurrent nor primary; it is exclusive, and thus completely ousts the antitrust laws with respect to any of the matters enumerated in Section 19(b).

The issue before this Court is not whether rate fixing by the nation's private securities exchanges is essential, under *Silver,* to the scheme of the Securities Exchange Act. It is how courts are to decide whether the antitrust laws have been repealed insofar as they would otherwise apply to commission rates collectively established in the rules of securities exchanges.

The analysis by the courts below departs from a

long line of this Court's decisions holding that repeal of the antitrust laws by implication from a regulatory scheme is strongly disfavored, and refusing to find such a repeal necessary.[4]

Silver held that the duty of self-regulation imposed on exchanges by the Securities Exchange Act did not, of itself, exempt such activities from the antitrust laws. It recognized, however, that self-regulatory activities within the general purview of the Act's requirements may give rise to an exemption from the antitrust laws. Even though "the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, * * * it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." 373 U.S. at 360–361. Arguably, even claims involving conduct which otherwise is a *per se* violation of the Sherman Act may be justified under this standard.

It was unnecessary for the Court in *Silver* to consider the effect of SEC review of the specific prac-

[4] See *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372–375; *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 302, n. 13; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–218; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351; *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357–358; *California* v. *Federal Power Commission*, 369 U.S. 482, 489; *United States* v. *Radio Corp. of America*, 358 U.S. 334; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *United States* v. *Pacific and Artic Ry. and Nav. Co.*, 228 U.S. 87, 105, 107; *United States* v. *Joint Traffic Association*, 171 U.S. 505; *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 314–315; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456–547.

tices there involved because the statute did not provide for it. Subsequently, however, in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, the Court reached that issue. *Ricci* involved a system of self-regulation, closely similar to the scheme for the securities industry, imposed on commodity exchanges by the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* This Court ruled that self-regulatory conduct, arguably within the supervisory authority of the Commodity Exchange Commission, was not, for this reason, immune from the Sherman Act (409 U.S. at 302, n. 13), and that the test of *Silver* requires a full examination by the antitrust court, of the defense of necessity under the regulatory act. See, also, *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994, appeal dismissed after remand, 469 F. 2d 14; *Harwell* v. *Growth Programs, Inc.,* 451 F. 2d 240 (C.A. 5), rehearing denied, 459 F. 2d 461, certiorari denied *sub nom. National Ass'n of Securities Dealers, Inc.* v. *Harwell,* 409 U.S. 876; *Zuckerman* v. *Yount,* 362 F. Supp. 858 (N.D. Ill.); *Fredrickson* v. *Merrill Lynch, Pierce, Fenner & Smith,* 1974–2 Trade Cases, ¶ 75,227 (N.D. Ill., decided September 9, 1974), appeal pending, C.A. 7; but cf. *Abbott Securities Corp.* v. *New York Stock Exchange,* 1974–2 Trade Cases, ¶ 75,324 (D.C.D.C., decided October 30, 1974). For the purposes of this examination it may be appropriate or even necessary that particular issues be referred to the regulatory agencies under the primary jurisdiction doctrine (see *Ricci, supra*), or the agency may participate in the court proceeding as an *amicus* or intervenor. But resolution of the manner of agency participation is for the trial court in the

first instance. See *Thill Securities Corp.* v. *New York Stock Exchange, supra.*

Only if the Securities Exchange Act contained a pervasive scheme of regulation, reflecting a deliberate legislative decision to substitute detailed governmental supervision for private initiative and free competition, could it be concluded that the regulatory powers reserved to the SEC under the Act completely oust the antitrust laws. Compare *Pan American World Airways* v. *United States,* 371 U.S. 296, with *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 351–352; *California* v. *Federal Power Commission, supra,* and *Otter Tail Power Co.* v. *United States, supra.* As we show, *infra,* pp. 26–35, the 1934 Exchange Act does not establish such a scheme. Far from imposing public utility type regulation on the exchanges, the Act was designed to assure that securities exchanges operate under a regime of free enterprise, subject only to a duty of self-regulation to protect investors, and the enumerated powers of the SEC to eliminate practices contrary to the public interest.

Indeed, the Act does not provide for SEC approval of exchange rate-fixing rules at all.[4] Such rules may be promulgated entirely at the exchange's private discretion. Cf. *American Telephone & Telegraph Co.* v. *Federal Communications Commission,* 487 F. 2d 865

[4] Although the 1934 Act does not provide for advance approval by SEC of exchange rules, SEC can, and has since 1964, required that it be notified in advance of proposed changes in such rules, so that it may scrutinize them. 29 Fed. Reg. 3471, 17 C.F.R. 240.17a–8. Cf. *American Telephone and Telegraph Co.* v. *Federal Communications Commission,* 503 F. 2d 612 (C.A. 2).

(C.A. 2). In such circumstances, a general repeal of the antitrust laws, leaving exclusive jurisdiction over price-fixing in the regulatory agency, cannot be inferred. *Carnation Co.* v. *Pacific Westbound Conference, supra.* The full examination contemplated by *Silver* is required.

The record in this case, made on defendants' motion for summary judgment, is inadequate for this purpose. purpose.

B. UNDER RICCI V. CHICAGO MERCANTILE EXCHANGE, 409 U.S. 289, A FULL RECORD SHOULD HAVE BEEN DEVELOPED FOR APPLICATION OF THE SILVER TEST.

Insofar as the court of appeals purported to distinguish *Silver* on the ground that the conduct challenged there was not subject to SEC oversight, it erred. The *Ricci* case makes clear that the *Silver* test applies even where self-regulatory conduct is within the scope of regulatory jurisdiction, that the antitrust court has the responsibility for applying that test, and that a full evidentiary record is needed.

1. The Silver case

Silver was an antitrust suit against the New York Stock Exchange (NYSE) by a non-member and his broker-dealer firms. He alleged that he had been injured by an illegal boycott, a *per se* Sherman Act violation, because his wire communications with exchange members had been terminated without notice or hearing. The members had terminated Silver at the direction of the NYSE, which acted under exchange rules adopted pursuant to the self-regulatory provisions of the Act. The district court ruled that the NYSE's statutory duty of self-regulation did not extend to

members' relations with non-members handling over-the-counter securities.[8]

The Second Circuit reversed (302 F. 2d 714). After reviewing the structure of the Act, the court concluded that it gave the SEC and the NYSE disciplinary powers over exchange members with regard to over-the-counter securities; that the Exchange was required to exercise these powers as part of its duty of self-regulation; and that application of the Sherman Act to particular decisions under this duty would defeat the statutory policy of self-regulation. The court of appeals explained that "[i]f securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities Exchange Act." *Id.* at 720–721. The Second Circuit's decision in the instant case closely parallels that reasoning.

This Court reversed. 373 U.S. 341. It noted that the Securities Exchange Act "does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules." *Id.* at 357. This made it unnecessary to consider whether the primary jurisdiction doctrine was applicable. Moreover, the Court continued, "the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power." *Id.* at 358. Had

[8] *Silver* v. *New York Stock Exchange*, 196 F. Supp. 209 (S.D.N.Y.).

such jurisdiction existed, the Court noted, "a different case would arise * * *." *Id.* at 358, n. 12.

Analyzing the case to determine whether the duty of self-regulation imposed by the Act was incompatible with the antitrust laws, the Court concluded that "[t]he entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act." *Id.* at 360. It rejected the district court's conclusion that the Act did not cover exchange members' relations with over-the-counter traders. 373 U.S. at 355–356. More significantly, however, the Court rejected the Second Circuit's holding that the Exchange's general duty of self-regulation, and the risk that antitrust liability might chill its performance, compelled the conclusion that the Act had repealed the antitrust laws.

Applying the test of necessity set forth above, pp. 12–13, *supra,* the Court concluded that no justification existed for termination of vital wire connections without notice or opportunity for hearing. No policy contained in the Securities Exchange Act was served by such conduct; on the contrary, it was inconsistent with the purpose of the self-regulatory scheme to protect investors and promote fair dealing.

The Court specifically assumed that the SEC, pursuant to its powers under Section 19(b), could adopt a general rule providing for notice and hearing. It recognized that the exchange rule involved was, to that extent, within the reserved supervisory jurisdic-

tion of the SEC. 373 U.S. at 364, n. 16.* It noted, moreover, that such a rule would have to provide for notice and hearing to be compatible with the antitrust laws. *Ibid.* Nevertheless, absent Commission adoption of such a rule of fair procedure, and given the Court's finding that such procedure is compatible with both antitrust and securities regulation principles, it concluded that under the necessity test the ecurities Exchange Act did not oust the antitrust laws as applied to the conduct involved, and that an antitrust court could announce the rule.

2. The Ricci case

The Court in *Silver* had reserved any question concerning primary or concurrent jurisdiction by the antitrust courts and the regulatory agencies, because the SEC did not have authority to review specific instances of enforcement of exchange rules. In *Ricci* v. *Chicago Mercantile Exchange, supra,* the Court considered this "different" case. The plaintiff in that case alleged a conspiracy under the Sherman Act to ex-

* "It may be assumed that the Securities and Exchange Commission would have had the power, under § 19(b) of the Exchange Act, 15 U.S.C. § 78s(b), pp. 352–353, 357 & note 7, *supra*, to direct the Exchange to adopt a general rule providing a hearing and attendant procedures to nonmembers. However, any rule that might be adopted by the Commission would, to be consonant with the antitrust laws, have to provide as a minimum the procedural safeguards which those laws make imperative in cases like this. Absent Commission adoption of a rule requiring fair procedure, and in light of both the utility of such a rule as an antitrust matter and its compatibility with securities-regulation principles (see p. 361, *supra*), no incompatibility with the Commission's power inheres in announcement by an antitrust court of the rule. Compare *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 723–724."

clude him from membership on the Chicago Mercantile Exchange, a designated contract market under the Commodity Exchange Act, 42 Stat. 998, as amended 7 U.S.C. 1, *et seq.* The district court dismissed the complaint. The court of appeals reversed the dismissal, but concluded that the challenged conduct was within the regulatory jurisdiction of the Secretary of Agriculture or the Commodity Exchange Commission under the Commodity Exchange Act. It therefore remanded the case with instructions that proceedings be stayed pending a submission of the matter to these authorities. 447 F. 2d 713 (C.A. 7).

The Commodity Exchange Act is closely similar to the Securities Exchange Act.[7] This Court reviewed the claims involved in the light of the *Silver* case. Since the complaint alleged that the challenged conduct violated the regulatory statute as well as the Sherman Act, the Court held that administrative authority over the dispute between the plaintiff and the exchange was sufficient to justify staying the case until the administrative officials could act on the Commodity Exchange Act issues.

The Court rejected any suggestion that the Com-

[7] It requires that all commodity futures be traded on contract markets as designated by the Secretary. Like securities exchanges, these markets are under a duty of self-regulation and are required to file their by-laws, rules and regulations with the Secretary. He may disapprove them, much as the SEC can object to or require changes in exchange rules. Failure to enforce rules for violation of provisions of the Act may result in CEA orders revoking the market's designation as a contract market or requiring it to cease and desist. By regulation, interested persons may request CEA to institute proceedings, the Commission may act on its own motion, or interested persons may apply for intervention. 409 U.S. at 291–297.

modity Exchange Act was "the exclusive instrument for the governance of the Exchange and its members," noting that the purpose and structure of the Act and past cases foreclosed that conclusion (409 U.S. at 302, n. 13).[8] This Court expressly held: "Nor do we find that Congress intended the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule-making authority of the Commission or the Secretary."[9] *Ibid.*

The Court noted four factors in support of this conclusion: the Act contained no categorical exemption of this kind, or indeed, any express exemption; the area of administrative authority was not particularly focused on competitive considerations; no express provision of the Act directed administrative officials to consider the policies of the antitrust laws; and there was no other indication that Congress intended the adjudicative authority conferred to be a complete substitution for judicial enforcement of the antitrust laws. *Ibid.* These factors apply here.

The Court also emphasized that reference to the administrative authorities of questions under the Commodity Exchange Act was justified because it would aid the antitrust court in resolving the immunity question. Thus the holding of *Ricci* is that

---

[8] The Court cited *Carnation Co.* v. *Pacific Westbound Conference*, *supra*; *United States* v. *Philadelphia National Bank*, *supra*; *Silver* v. *New York Stock Exchange*, *supra*; *Pan American World Airways* v. *United States*, 371 U.S. 296; *United States* v. *Borden Co.*, *supra*.

[9] Citing *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 350–354; *California* v. *Federal Power Commission*, *supra*; *Maryland & Virginia Milk Producers* v. *United States*, 362 U.S. 458; *United States* v. *Radio Corp. of America*, 358 U.S. 334, 339–352.

the antitrust courts retain the final authority to determine the effect of a regulatory statute on the antitrust laws: "[T]he question of immunity, as such, will not be before the agency; but if Ricci's complaint is sustained, the immunity issue will dissolve, whereas if it is rejected and the conduct of the Exchange warranted by a valid membership rule, the court will be in a much better position to determine whether the antitrust action should go forward." 409 U.S. at 306. Re-emphasizing this point, the Court stated that "[w]e make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and the Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and regulatory regime." 409 U.S. at 307.

The four dissenting justices also agreed with the majority that the Commodity Exchange Commission's power to order enforcement of the Exchange's rules did not deprive the courts of power and responsibility to make the accommodation "between usual antitrust principles and the self-regulatory and exclusionary powers that the exchanges were obviously intended to exercise." 409 U.S. at 314.

3. The need for a full record

Silver, Ricci, and the cases on which they are founded, thus make clear that the question of implied repeal of the antitrust laws under any provisions of the Securities Exchange Act, including Section 19(b), is for the antitrust courts, and that in answering this question they may recognize such a repeal only to the minimum extent necessary to achieve the purposes and aims of the 1934 Act. This cannot be determined in the abstract, or on a summary record. Other courts faced with almost identical questions have, therefore, insisted that full records be developed. *Thill Securities Corp.* v. *New York Stock Exchange, supra,* 433 F. 2d at 273 (C.A. 7); *Harwell* v. *Growth Programs, Inc., supra,* 451 F. 2d at 247 (C.A. 5); *Fredrickson* v. *Merrill Lynch, Pierce, Fenner and Smith,* 1974–2 Trade Cases, ¶ 75,227 (N.D. Ill., decided September 9, 1974)

A full record is necessary because the *Silver* test is an aspect of the rule of reason. *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 360; *United States* v. *Terminal R. Ass'n of St. Louis,* 224 U.S. 383, 394–395; *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231, 238. Thus, it is not enough simply to challenge exchange rules establishing fixed commission rates as illegal *per se* under the antitrust laws. The defendants must be permitted to show, if they can, that the practice comes within the duty of self-regulation imposed by the Securities Exchange Act and that it meets the *Silver* test. *Kaplan* v. *Lehman Bros.,* 371 F. 2d 409 (C.A. 7), certiorari denied, 389 U.S. 954.

This is shown by the subsequent interpretation of *Kaplan* v. *Lehman Bros., supra,* by the court which

decided it, in *Thill Securities Corp.* v. *New York Stock Exchange, supra.* The district court in *Thill* had granted summary judgment against a complaint challenging a NYSE rule prohibiting the sharing of commissions between members and non-member brokers. It held, like the courts in this case, that the subject of commission rates was the exclusive responsibility of the SEC under Section 19(b). See *Thill, supra,* 433 F. 2d at 267–268.

The court of appeals reversed and remanded for a full trial, noting that "[b]efore the investing public of the United States may be deprived of the benefit of competition through the vehicle of Exchange rules, it must be established that the Exchange's exemption from the antitrust laws is necessary to discharge its responsibilities under the Securities Exchange Act * * *. In short, its exemption must be based on a showing of true necessity." 433 F. 2d at 269. It found "in the teachings of *Silver,* no 'intimation' that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity." *Ibid.*

Discussing *Kaplan, supra,* it noted that the plaintiff in that case, by arguing for a strict *per se* rule, had directly contradicted the rule of reason test of *Silver. Id.* at 270. It remanded for a full trial, which has now been completed and is awaiting decision.[10]

[10] Following remand to the district court by the court of appeals, 433 F.2d at 275, the United States intervened as a party plaintiff alleging that the Exchange's anti-rebate rules unreasonably restrict access to the Exchange by non-members. The Securities and Exchange Commission also intervened. After a full trial, which lasted nearly three months, the evidence was closed on February 28, 1973, post-trial briefs and proposed

The Fifth Circuit adopted the same approach in *Harwell* v. *Growth Programs, Inc., supra.*

Here, in contrast, no adequate record has been made. Defendants moved for summary judgment on the basis of their claim that the SEC has exclusive jurisdiction over exchange price fixing. In support they offered only materials showing (1) that the SEC had reviewed their constitution and rules, which included standard commission rates, at the time the exchanges were originally registered in 1934; and (2) that in 1959, and at various times since 1968, the SEC has considered aspects of exchange rate fixing. This showing falls far short of the factual requirement necessary for application of the *Silver* test. Summary dismissal of an antitrust case involving such complex issues is particularly inappropriate. Cf. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473; *White Motor Co.* v. *United States,* 372 U.S. 253, 259, 261; *Scheuer* v. *Rhodes,* 416 U.S. 232, 250.

C. NEITHER THE LANGUAGE AND STRUCTURE OF THE ACT NOR ITS LEGISLATIVE HISTORY INDICATES THAT EXCLUSIVE JURISDICTION OVER EXCHANGE PRICE-FIXING IS VESTED IN THE SEC

1. The language and structure of the Act

The Securities Exchange Act was designed to preserve the private initiative and responsibility which exchanges enjoyed prior to its enactment; to require

---

findings were filed; after final oral argument, the case was submitted July 30, 1973 and is presently *sub judice.*

In a subsequent opinion dismissing an appeal by the NYSE from the district court's order denying the Exchange's motion for referral of the issues to the SEC, the Seventh Circuit reaffirmed its ruling. 469 F.2d 14, 15, n. 3. The court also held that primary jurisdiction questions could be resolved on appeal from the final judgment. *Ibid.*

vigorous self-regulation by the exchanges to insure investor protection—to which the Act refers thirty-five times[11]—and to provide for oversight by the SEC, to the extent specified in various sections. The Act contains no provision for issuance of certificates of convenience and necessity to exchange members; no requirement that uniform brokerage tariffs be filed with SEC; no rule of rate-making to assure members a return on their investment; and no requirment that members obtain SEC permission to cease doing business. The Act does not empower the SEC to enforce the antitrust laws through administrative proceedings, or to grant any antitrust immunity to exchanges. Nor does it require that the SEC approve exchange rules before they may be implemented by exchanges.

Section 2 declares that securities transactions on exchanges and over-the-counter markets are affected with a national public interest which makes regulation and control necessary. It emphasizes the Congressional concern with protection of investors from the evils of manipulation and control of prices on exchanges and markets; excessive speculation; and the abuse and excessive use of credit.

Section 6 provides for the registration of exchanges with the SEC, and Section 5 prohibits securities transactions on unregistered exchanges. Section 6 provides, *inter alia,* for registration if it appears to the SEC that the exchange is so organized as to be able to comply with the Act and the rules thereunder, and that its own rules "are just and adequate to insure

[11] *Baird* v. *Franklin*, 141 F.2d 238, 244 n. 4 (C.A. 2), certiorari denied, 323 U.S. 737.

fair dealing and to protect investors." Section 6(b) recognizes that an exchange's rules must provide sanctions against members for conduct inconsistent with just and equitable principles of trade; and Section 6(d) allows registration only if the exchange's organization assures compliance with the Act and rules thereunder, and if the exchange's rules "are just and adequate to insure fair dealing and to protect investors." Thus Section 6(b) and (d) implies an affirmative obligation of exchanges to conduct the process of self-regulation in the public interest, and to enforce the rules they file with the SEC.

Section 19(a) of the Act empowers the SEC to suspend or withdraw the registration of an exchange for violation of the Act or SEC rules, or for failure to enforce its own rules. Section 19(b) permits the Commission itself to make changes in the rules of an exchange, dealing with enumerated subjects including, in Section 19(b)(9), "the fixing of reasonable rates of commission * * *." No procedure is provided in Section 19(b) or elsewhere in the Act by which private parties may challenge exchange rules either at the time of filing or thereafter.[12] Nor does the Act provide that the SEC must approve rules before they may be implemented, or suspend them pending investigation.

However, if an exchange refuses to make changes in its rules requested by the SEC, the agency may alter or amend them with respect to specified subjects. To do this, it must determine, after notice and opportunity for hearing, that "such changes are necessary or appropriate for the protection of investors or to

[12] See *Silver* v. *New York Stock Exchange*, *supra*, 196 F. Supp. at 219–221.

insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange * * *." Section 19(b).

Section 10(a) and (b) contains provisions giving the SEC powers of direct rule making with respect to short sales, stop-loss orders and manipulative or deceptive devices. Section 11(a) and (b) grants similar powers with respect to floor trading, off-floor trading by members, and operations of specialists and odd-lot dealers. Thus, the statute distinguishes between the SEC's reserved powers of oversight over exchange self-regulation, and its power directly to impose requirements on the exchanges with respect to the particular matters enumerated in Sections 10 and 11.[13]

2. The legislative history

The legislative history confirms the primary role given to private initiative in performance of the duty of self regulation, and the reserved role of the SEC's oversight thereof. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware, supra,* 414 U.S. at 128, n. 9. This approach had been emphasized in a report by the Roper Committee to President Roosevelt on regulation of exchanges.[14]

Thereafter, legislation to establish a system of

[13] The Act also provides in Sections 7 and 8 for direct control of margin credit by the Board of Governors of the Federal Reserve System. The purpose of this direct regulatory authority is to prevent excessive use of credit. 15 U.S.C. 78g.

[14] The Committee was chaired by then Secretary of Commerce Roper. Letter from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, 73d Cong., 2d Sess. (Committee Print).

regulation was introduced in Congress as H.R. 7852, 73d Cong., and S. 2693, 73d Cong. Strong industry opposition developed, however, and after extensive hearings [15] the legislation was revised and reintroduced, S. 3420, 73d Cong., was reported to the Senate in S. Rep. No. 792, 73d Cong., 2d Sess.; and H.R. 9323 was reported to the House in H. Rep. No. 1383, 73d Cong., 2d Sess. Both reports emphasized that exchanges would be required to exercise a wide measure of economic responsibility and initiative, while the regulatory agency was to stand in reserve, ready to act only if the exchanges failed adequately to protect investors. H. Rep. No. 1383, *supra*, at p. 15; S. Rep. No. 792, *supra*, at p. 13.

The only reference to fixed commission rates of any significance occurred during testimony in the Senate hearings by Samuel Untermeyer. He had been counsel to the "Pujo" Committee which had investigated stock exchange operations for the House of Representatives in 1912 and 1913.[16] The bill under consideration (S. 2693), provided that "the Commission may fix or prescribe the method of fixing uniform rates of commission." Mr. Untermeyer urged that the word "uniform" be stricken because "that would permit the Commission to fix rates * * *." Mr. Untermeyer favored prescription of rates by governmental authority because he believed that "the exchanges charge all

[15] See Hearings before the Senate Committee on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), 73d Cong., 1st and 2d Sess. (hereinafter cited as "Senate Hearings"); Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess. (hereinafter cited as "House Hearings").

[16] See H. Rep. No. 1593, 62d Cong., 3d Sess.

that the traffic will bear and that is a burden on commerce." Senate Hearings, p. 7705. Without explanation, the House substituted for "uniform" the word "reasonable," and it was ultimately included in Section 19(b)(9) as passed.

The Senate rejected proposals to strike from the bill the various subjects enumerated in Section 19(b). 78 Cong. Rec. 8591–8592. In the House, the principal concern with this provision was over the procedure for judicial review of Commission action; some legislators feared that without a procedure for review the Commission might fix commission rates at confiscatory levels. Others feared that review could be used to delay and defeat the Commission's exercise of power under Section 19(b). 78 Cong. Rec. 8090–8091. In the end, the bill provided in Section 25(a) for court of appeals review of Commission orders but not Commission rules. See *PBW Stock Exchange, Inc.* v. *Securities and Exchange Commission,* 485 F.2d 718 (C.A. 3), certiorari denied, 416 U.S. 969.

Congress finally enacted, with various modifications, the revised House proposal, H.R. 9323. As we have seen, it empowered the SEC to rule on the fixing of rates should it determine that this was necessary or appropriate for investor protection, fair dealing or fair exchange administration. But the legislative history is barren of any evidence that Congress intended a general repeal of the antitrust laws with respect to the matters enumerated in Section 19(b).[17]

[17] The 73d Congress adopted the Communications Act of 1934 on June 19, 1934. 48 Stat. 1064. It provided in Section 221(a) express antitrust immunity for telephone company mergers approved by the Federal Communications Commission. 47 U.S.C. 221(a). If that Congress had intended a similar im-

As to these it opted for a system of exchange self-regulation under SEC supervision. This method of supervision, it believed, would allow the exchanges sufficient freedom to perform their vital function as capital markets, while providing sufficient government oversight to assure protection of investors.[18] With respect to the other evils which had led to the statute—manipulation and control of securities prices, excessive speculation and the abuse of margin credit—the Act provided for direct regulation. See p. 29, *supra*. See S. Rep. No. 792, *supra*, at p. 5.

Not long after, when the 74th Congress amended the Act in 1936 by adding Section 12(f), authorizing exchanges to deal in unlisted securities (49 Stat. 1375, as amended, 15 U.S.C. 78*l*(f)), the Senate report emphasized that the purpose of the amendment was to "create a fair field of competition among exchanges and between exchanges as a group and the over-the-counter markets and to allow each type of market to develop in accordance with its natural genius and consistently with the public interest." S. Rep. No. 1739, 74th Cong., 2d Sess., p. 3. Thus the almost contemporaneous legislative construction assumed that competition was highly significant in the securities industry, despite SEC regulation.

This legislative view was further confirmed in 1938, when the 75th Congress adopted the Maloney Act, Section 15A of the Securities Exchange Act, 52

---

munity to arise under the Securities Exchange Act it was considering about the same time, "Congress doubtless would have said so." *United States* v. *Borden Co.*, *supra*, 308 U.S. at 201.

[18] See testimony of Thomas G. Corcoran, one of the draftsmen of the original bills. Senate Hearings, *supra*, part 15, 6566.

Stat. 1070 as amended, 15 U.S.C. 78*o*–3(a)–(n). This statute provides for regulation of over-the-counter markets by requiring registration with the SEC of brokers and dealers, and of associations of securities dealers whose organization and rules meet the Act's requirements. 15 U.S.C. 78*o*–3(b).

Like exchanges, the associations must regulate themselves by rules, and discipline members who failed to adhere to them. Such rules must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market." 15 U.S.C. 78*o*–3(b)(8). However, the Act specifically bars rules "designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges." *Ibid.*

In the Maloney Act, Congress thus expressly made adherence to antitrust principles barring price fixing and discrimination an express condition for registration of broker-dealer associations. The absence of similar language from the provisions for registration of exchanges does not indicate an intent to repeal the antitrust laws with respect to them; rather, the Maloney Act, unlike the exchange section, imposes on the SEC an express duty to take the enumerated antitrust principles into account in reviewing associa-

tions' rules. The absence of such a requirement from the Exchange Act indicates that the antitrust laws are not repealed. See p. 22, *supra*. The SEC is also specifically empowered to review disciplinary actions by associations against their members—the element missing from *Silver*—and to abrogate rules to assure fair dealing, fair representation of its members in its administration to protect investors, or to effectuate the purpose of the Act; and to alter or supplement the rules with respect to enumerated matters relating to qualifications for membership, the method for changing Association rules, the method of choosing officers and directors, and affiliation between registered securities associations. 15 U.S.C. 78*o*–3 (g), (k).

Finally, Section 15A(n) provides that "[i]f any provision of this Section is in conflict with any provision of any law of the United States in force on June 25, 1938, the provision of this section shall prevail." 15 U.S.C. 78*o*–3(n). This language, however, does not define a specific exemption from the antitrust laws. II Loss, *Securities Regulation,* 1369 (2d ed. 1961).[19] The only decision authoritatively to construe this provision concluded that it is a legislative statement of the *Silver* test for determining when the Securities Exchange Act prevails over the antitrust laws: "[T]he Maloney Act 'prevails' over any other laws of the United States only to the extent that they conflict. To determine if they conflict, the Maloney Act should be construed to reach only those things necessary to carry out the purposes of the Act." *Harwell* v. *Growth*

[19] But cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227, n. 60; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 809, n. 16 (Frankfurter, J. dissenting); *United States* v. *Morgan*, 118 F. Supp. 621, 693 (S.D. N.Y.).

Programs, Inc., 451 F. 2d 240, 247 (C.A. 5), rehearing denied, 459 F. 2d 461 (C.A. 5).

Thus in the Maloney Act, Congress expressly incorporated certain antitrust principles and made it the duty of the SEC to enforce them as applied to associations of over-the-counter dealers; and as the Fifth Circuit correctly held in *Harwell*, it legislatively anticipated the *Silver* test.[20] The 1938 amendment therefore supports the views expressed in *Silver* that the securities industry is not exempted from the antitrust laws except to the limited extent that the Securities Exchange Act directly conflicts with those laws, even as to matters within SEC's oversight.

D. IN THE ABSENCE OF CLEAR LEGISLATIVE INTENT, THE COURT OF APPEALS HAD NO BASIS FROM WHICH TO INFER THAT THE SEC HAS EXCLUSIVE JURISDICTION OVER PRICE FIXING

1. No pervasive regulatory scheme is substituted for price competition

The language, structure and history of the Act, as set forth above, show that Congress did not intend to substitute a comprehensive, public utility-like system of government regulation for the regime of competition fundamental to private enterprise in other sectors of the economy. The SEC has concisely recognized this in advice to Congress:

> It was not the purpose of the Exchange Act, unlike certain other regulatory statutes, to limit or restrict competition in the securities industry. The purpose of the Exchange Act

[20] In light of the *Silver* decision, the Senate recently passed legislation which would have repealed Section 15A(n), *supra*, on the ground that that section was unnecessary. See n. 25, *infra*.

> rather was to protect investors by prohibiting fraudulent, deceptive, or manipulative practices, providing additional disclosure with respect to securities and regulating the operation of the markets in the interest of making them fair, honest, and orderly. The commission consequently does not engage in economic regulation in the sense of awarding exclusive franchises or licenses, fixing or regulating prices or restricting entry into the field upon economic grounds, such as 'public convenience, interest or necessity.' Anyone may enter the securities business unless disqualified either by past misconduct or by lack of training or experience. New exchanges may be established if they are so organized as to be able to comply with the standards of the act and the prices of securities are determined by competitive forces. Similarly, broker-dealers may either compete, or may liquidate, merge or consolidate without authorization from the Commission.[21]

Because the scheme of regulation is thus limited, and because members of the exchanges enjoy the same private initiative as other commercial enterprises, they are subject to the national policy of competition. As the Court has observed: "'We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more gen-

[21] Letter of Hon. Manuel F. Cohen, Chairman, Securities and Exchange Commission, to the Honorable A. Willis Robertson, Chairman, Committee on Banking and Currency, U.S. Senate, July 30, 1965, reported at 111 Cong. Rec. 19021.

eral provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conference, supra*, 383 U.S. at 218. The absence of a pervasive scheme of regulation to take the place of a regime of free competition distinguishes this case from *Pan American World Airways* v. *United States*, 371 U.S. 296. Congress rejected such a scheme "in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374.

2. No exemption by Section 19(b)(9) or by registration of exchanges

(a) The express inclusion of price fixing rules among matters subject to SEC oversight under Section 19(b)(9) does not manifest a legislative purpose to place such conduct exclusively within SEC's jurisdiction. The statutory language itself does not require a fixed commission system. It says only that the SEC may require changes in rules respecting "the fixing of reasonable rates of commission." An exchange or SEC rule abolishing fixed commissions and creating a regime of price competition would be as much within the scope of oversight under Section 19(b)(9) as rules establishing or continuing them.[22]

[22] As one commentator has observed (Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 Stan. L. Rev. 675, 690 (1970)): "Section 19(b) does not authorize the NYSE to do anything; it authorizes the SEC to alter or

Moreover, the SEC's powers under Section 19(b) are limited. The Act does not provide that it must approve such rules before they become effective. Nor does it provide that they may be suspended pending investigation. The SEC has advised Congress that it "has no power to prevent the adoption of a particular rule by an exchange, nor to abrogate it once it has been adopted. [Cf. *American Telephone and Telegraph Co.* v. *Federal Communications Commission,* 503 F. 2d 612 (C.A.²) (FCC may not require advance approval for filing of carrier-made tariffs).] It does have the power to require alterations in exchange rules [to the extent enumerated in Section 19(b)] but only * * * after following cumbersome procedures." Letter of SEC Chairman Casey to the President of the Senate, December 28, 1971, transmitting SEC Study of Unsafe and Unsound Practices of Brokers and Dealers, H. Doc. No. 92–231, 92d Cong., 1st Sess., pp. 6, 41–42.

Exchange-made commission rates, therefore, are analogous to carrier-made rail rates which have been allowed to become effective by the Interstate Commerce Commission. As to such rates, in contrast to

---

supplement Exchange rules 'in respect of' 12 enumerated subject-matter areas of great diversity 'and similar matters.' Section 19(b)(9), dealing with one of those enumerated areas, does not even advert to the possibility that the NYSE might fix minimum commission rates, which the SEC might then want to alter or supplement; rather, the type of rule that the Act mentions in describing the Commission's jurisdiction concerns 'the fixing of reasonable rates of commission.' A wide variety of rules answering that description can be imagined—for example, a rule prohibiting agreements among member firms with regard to commissions—that would not violate the antitrust laws."

ICC-prescribed rates, the carriers cannot claim governmental sanction if they are subsequently challenged. *Arizona Grocery* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370. And the agency's supervisory responsibilities do not foreclose antitrust liability for rate-making agreements concerning such rates, if not immunized by statute. *Georgia* v. *Pennsylvania R. Co.*, *supra*.

With respect to the SEC's dealings with the exchanges concerning their rates between 1934 and the present,[23] the agency has denied that it has engaged

---

[23] The SEC took almost no action concerning exchange rates until after *Silver* was decided. It has never made any formal determination that the system was necessary to make the Act work. Rather, it has recently adopted Rule 19b-3, prohibiting fixed commission rates. Securities Exchange Act Release No. 11203 (January 23, 1975).

It seems to have questioned an aspect of the New York Stock Exchange's fixed commission rate system for the first time in 1959. See Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange*, 80 Yale L. J. 811 (1971); this resulted in certain voluntary modifications by the Exchange in its proposed rate structure (Securities Exchange Act Release No. 5889 (1959) (App. A-247)). Then in 1961, Congress directed the SEC by an amendment to Section 19 of the Act (Section 19(d), 75 Stat. 465, 15 U.S.C. 78s(d)) to investigate the adequacy for the protection of investors of the rules of securities exchanges and securities associations. This resulted in a comprehensive "Special Study of Securities Markets" (hereinafter, "Special Study"), H. Doc. No. 95, 88th Cong., 1st Sess.). The study reported that the rigid fixed rate system adopted by the exchanges had resulted in elaborate efforts by non-members, particularly large institutional investors with economic leverage, to reduce their brokerage costs by requiring exchange members to "give up" commissions as compensation to other brokers, or to engage in certain reciprocal transactions. The study also disclosed that although commission rates were increased five times between

in reviewable "agency action" at all, much less given formal "approval" of the rules. *Independent Broker-Deal. T. Ass'n* v. *Securities & Exchange Commission*,

---

1934 and 1959, the SEC never undertook a full scale examination of the system, the rate structure or their justification. The Exchanges had not offered, and the SEC had not required regular, systematic and consistent proof of need, nor were there uniform criteria for such essential factors as income, methods for allocating costs to various kinds of business or other standards. Special Study, Part 2, pp. 328–334, 347.

In 1968, for the first time, the Commission conducted a proceeding inquiring into whether a minimum exchange rate structure is necessary to the operation of the securities industry. It was, however, an investigatory hearing under section 21(a) of the Act, 15 U.S.C. 78u(a), seeking only to elicit general information, not a proceeding under Section 19. In 1972, the Commission announced its commitment to the creation of a nationwide central market system for listed securities, and specifically noted that fixed minimum brokerage commissions were a significant barrier to achievement of this result. Statement on the Future Structure of the Securities Market (February 2, 1972). By this time, the Commission had attempted to induce the exchanges to eliminate fixed commission rates for orders in excess of $50,000 (Securities Exchange Act Release No. 9007, October 22, 1970) (App. A–348). In the face of exchange opposition, however, it acquiesced in rule changes which preserved fixed commissions below $500,000. Competitive rates for orders in excess of $300,000 finally were implemented by the Exchange in April 1972.

On June 6, 1973, the Commission announced another public investigatory hearing under Section 21(a) specifically addressed to fixed commission rates (Securities Exchange Act Release 10206, June 6, 1973. On September 11, 1973, it announced its intention to terminate fixed rates after April 30, 1975, if the exchanges did not voluntarily do so. Security Exchange Act Release No. 10383. In response to Commission urgings, the New York Stock Exchange initiated a program of limited price competition for orders under $2,000 (Securities Exchange Act Release No. 10670, March 7, 1974). Finally, on September 19, 1974, acting under Section 19(b), the Commission requested exchanges to eliminate fixed commission rates. In light of a generally negative response from the exchanges, on October 24,

442 F. 2d 132, 137 (C.A.D.C.), certiorari denied, 404 U.S. 828. Thus in *Independent Investor Protective League* v. *Securities and Exchange Commission,* S.D. N.Y., No. 71–1924, dismissed without opinion, November 15, 1971, the agency characterized its letter advising the New York Stock Exchange of its views on proposed rate changes as merely a "non-objection." [24]

(b) The registration of the exchanges with the SEC pursuant to Section 6 of the Act does not constitute a basis for inferring that exchange rules submitted to the SEC with the registration statement are exempt from the antitrust laws. Registration may be granted under Section 6(b) and (d) if the exchanges' rules are just and adequate to insure fair dealing and to protect investors, and are consistent with just and equi-

---

1974, the SEC announced proceedings on a proposed rule 19b-3 prohibiting the fixing of rates of commission by stock exchanges effective May 1, 1975. Securities Exchange Act Release No. 11073, October 24, 1974. This rule was adopted January 23, 1975. Securities Exchange Act Release No. 11,203, *supra.*

[24] The Preliminary Report to the Senate Securities Industry Study, for the period ending February 4, 1972, page 58, summarized SEC's argument as follows (Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, 92d Cong., 2d Sess. 58 (Committee Print)):

"The SEC argued that it had conducted no 'proceeding', that its letter to the NYSE did not 'approve' the new rates, that it was 'at most in the nature of an interlocutory non-objection,' which 'does not differ materially from the thousands of interpretive and comment letters the Commission sends each year to registrants of securities, broker-dealers, investment advisors, investment companies and public investors seeking guidance,' and that 'the Exchange may adopt a [*sic*] decline to adopt all or any part of its rule proposals at any time, whether or not modified in response to the comments set forth in the Commission's letter.' "

table principles of trade. 15 U.S.C. 78f(b) and (d). Section 6, however, does not require the SEC to consider competitive factors, much less provide that the act of registration exempts exchanges from the antitrust laws. On the contrary, the Act provides in Section 28 that "[t]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity * * *." 15 U.S.C. 78bb.

The exchanges were granted registrations in September 1934, in brief conclusory orders, which reserved the SEC's right to revoke registration or take such other action under Section 19 or other appropriate provisions, as it deems necessary (App. A–37, A–238). See First Annual Report of the Securities Exchange Commission (1935), p. 11. Although each exchange's rules were carefully scrutinized by the SEC's staff, there was no public participation in the registration process, nor was registration accompanied by any articulation of the reasons why the Commission found the rules of the exchanges to conform to the Act. We do not contend that the statute requires either consideration of competitive factors, public proceedings or formal opinions before the SEC can register an exchange. Rather, the absence of such requirements is a strong indication that Congress did not intend registration to cut the public off from rights otherwise assured by the antitrust laws. *Silver* v. *New York Stock Exchange, supra.*

In these circumstances, no claim of immunity from the antitrust laws can arise on the basis of a claimed conflict with the agency's past exercise of its regu-

latory responsibilities under Sections 6 and 19. This is made clear by *Carnation Co.* v. *Pacific Westbound Conference, supra.* The Court there held that shipping conference rate agreements implemented before receiving approval from the Federal Maritime Commission, which by statute would have immunized them from the antitrust laws, were subject to treble damage liability. Inaction or acquiescence by the regulatory agency likewise forms no basis for immunity. *United States* v. *Borden Co., supra,* 308 U.S. at 198–200, 201; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 225–227. Here the reasons for non-immunity are even stronger, for nothing in the Act provides for agency approval of price fixing rules, or immunity if it is granted. Cf. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 350–352.

3. Antitrust jurisdiction complements regulation

The court of appeals erroneously concluded that there is an irreconcilable conflict between judicial and administrative responsibility. The conclusions of the Special Study (*supra,* n. 23) and the threat of antitrust liability which followed, have stimulated SEC exchange officials and Congress to examine the necessity for fixed commission rates.[25] As the House Study

[25] Congress recently has been actively concerned with this subject. A Senate unit conducted extensive hearings and prepared its own securities industry study. Securities Industry Study, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (Committee Print) (hereinafter, "Senate Study"). The Subcommittee concluded that non-competitive rates should be eliminated (Senate Study, pp. 43–63). It also observed that the existence of SEC review authority over particular

(see n. 25, *supra*) observed at p. 163: "[i]n the absence of vigorous regulation in this area over the years by the SEC, private antitrust actions, or the threat thereof, have been the only effective vehicle for inhibiting or challenging exchange excesses."

---

aspects of exchange self-regulation did not immunize anticompetitive conduct from the antitrust laws; rather, the *Silver* test applied (Senate Study, p. 227).

A similar investigation was undertaken by a unit of the House. Securities Industry Study, Report of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (Subcommittee Print) (hereinafter, "House Study"). It also concluded that the fixed commission rates are not in the public interest (House Study, p. XIV, pp. 131–146) and that the *Silver* test should be applied to fixed commission rates (House Study, pp. 160–167). Out of these investigations and their accompanying hearings emerged three bills: H.R. 5050, 93d Cong., S. 470, 93d Cong. and S. 2519, 93d Cong.

As reported, H.R. 5050 provided for the elimination of all fixed commission rates on securities exchanges by May 1, 1975, except that the SEC could, upon hearing and appropriate findings, continue or reinstitute fixed rates until October 1, 1976. H. Rep. No. 93–1476, pp. 9, 46–48, 66–67. This bill, reported late in the second session of the 93d Congress (November 19, 1974), did not reach the floor of the House for debate.

The Senate passed S. 470, which would have prohibited the denial of membership on the exchanges to financial institutions, as long as fixed commission rates continued to exist. The Senate Report on the bill, S. Rep. No. 93–187, 93d Cong., 1st Sess., p. 3, stated that there were difficulties with any attempt to set a precise date for eliminating any fixed rates, so that "it was decided to leave the speed and the manner in which fixed rates are phased out to the securities industry, the SEC, and the courts." The Senate rejected an amendment which would have empowered the SEC in its discretion to continue fixed minimum rates for transactions under $100,000. The bill passed the Senate 85 to 3. 119 Cong. Rec. S11368–S11387 (daily ed., June 18, 1973).

Subsequently the Senate also passed S. 2519, *supra*, which is

The availability of judicial remedies under the antitrust laws under the *Silver* test, supplements rather than conflicts with the SEC's responsibilities. Those remedies operate much like private enforcement of SEC proxy rules under Section 14(a) of the Act, 15 U.S.C. 78n(a). This remedy "provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements." *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 432. Similarly, even though the SEC has powers of direct regulation under Section 10(b), dealing with manipulative or deceptive practices (see discussion, *supra,* p. 29), the courts have jurisdiction to enforce private claims for violation of this Section or SEC's rules thereunder. See III Loss, *Securities Regulation,* p. 1428 (2d ed. 1961).

By the same reasoning, even though the SEC has powers under Section 19(a) to discipline exchanges which fail to discipline members under their internal

---

designed to implement a central market system. 120 Cong. Rec. S8950–S8958 (daily ed., May 28, 1974). The bill would have modified Section 15A of the Securities Exchange Act (the Maloney Act), which establishes a system of self-regulation for securities dealers operating in the over-the-counter market. Section 15A(n) declares that the Maloney Act prevails over any provision of other laws with which it may conflict. The Senate voted to repeal this as unnecessary, because it concluded that under existing law the antitrust courts retain "jurisdiction to make the ultimate accommodation between antitrust principles and the powers and actions of the self-regulatory organizations." S. Rep. No. 93-865, 93d Cong., 2d Sess., p. 11. The report cites *Silver*, *Ricci*, and the Fifth Circuit's decision in *Harwell* v. *Growth Programs*, *supra*.

rules for protection of investors, and willful violations of the Act or SEC rules by an exchange may result in a $500,000 fine (Section 32, 15 U.S.C. 78ff), private parties have a right of action as well. *Baird* v. *Franklin, supra.* This remedy is not foreclosed because the Act specifies other remedies. Similarly, the *Silver* test, which emphasizes reconciliation of the judicial and administrative regimes to the maximum extent possible, implies the principle "* * * that agencies and courts together constitute a 'partnership' in furtherance of the public interest and are 'collaborative instrumentalities of justice.'" *Greater Boston Television Corp.* v. *Federal Communications Commission,* 444 F. 2d 841, 851–852 (C.A. D.C.); *United States* v. *Morgan,* 313 U.S. 409, 422.

The 1963 Special Study (n. 23, *supra*) recognized that in the absence of effective competition, much more extensive and detailed regulation by the government would be necessary. The antitrust laws, by protecting competition in the securities industry, thus provide an essential complement to existing regulation.[36]

---

[36] Special Study, Part 2, p. 957:

"The extent of needed regulation of markets in the public interest surely depends, at least in part, on the effectiveness of competition among markets—not merely competition for the handling of transactions in multiple traded securities but competition to become the primary market for particular securities—in maintaining high standards of performance. Indeed, in the absence of effective competition among markets in both senses, the sheer size and power of any one or two markets might enlarge the scope and degree of needed governmental intervention to the point where the adequacy of present regulatory concepts would be open to question. Considerations of this

4. Legislative awareness of exchange price fixing

The court of appeals' emphasis upon the fact that the Act was adopted seven years after *Trenton Potteries* is also misplaced. As we have seen, Congress was aware from Mr. Untermeyer's testimony that exchange members have continuously set the rates of commission to be charged their customers by agreement. But there is no evidence that Congress' attention was ever meaningfully called to any link between *Trenton Potteries* and exchange price fixing.

Absent such evidence no inference of a legislative intention to declare *Trenton Potteries* inapplicable may be drawn. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law" (*Girouard* v. *United States,* 328 U.S. 61, 69), much less a policy change as grave as repeal of the antitrust laws. See also *National Labor Relations Board* v. *Plasterers' Union,* 404 U.S. 116, 129–130. It was not clear even as late as 1934 that the Sherman Act could be applied to exchange practices.

Argument was then still current as to whether exchange transactions were within the reach of the Federal Commerce Power.[27] Only two decades earlier, in 1913, the Pujo Committee had reported that exchange price fixing had only local effect and thus was appar-

---

kind appear to have entered into the Commission's expressions of policy on unlisted trading privileges in 1936 and multiple trading in 1940. (See pt. E.) Although the context may have changed somewhat, these considerations have at least equal pertinence today."

[27] See Tracy and MacChesney, *The Securities Exchange Act of 1934,* 32 Mich. L. Rev. 1025, 1037, n.* (1934).

ently beyond the power of Congress. H. Rep. No. 1593, 62d Cong., 3d Sess., pp. 114–116. Cf. *Federal Baseball Club* v. *National League,* 259 U.S. 200. Not until 1950, when this Court held in *United States* v. *National Ass'n of Real Estate Boards,* 339 U.S. 485, that rate fixing by an association of real estate dealers was a *per se* violation of the Sherman Act, was the validity of exchange price fixing under the antitrust laws first questioned.[28]

5. Inconsistent results

The court of appeals' fear that application of the *Silver* test is likely to subject exchanges to repetitive and conflicting standards misconceives this court's reasoning in that case. The intent and the effect of *Silver* is to provide a mechanism for reconciliation of the two statutes' schemes. If the SEC were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise. *United States* v. *Borden Co., supra,* 308 U.S. at 201; *Parker* v. *Brown,* 317 U.S. 341.

But the SEC has never made such an order. Moreover, it is always possible to include in antitrust decrees language which provides for the contingency that it will do so. *Otter Tail Power Co.* v. *United States, supra,* 410 U.S. at 375; *United States* v. *Terminal R. Ass'n of St. Louis, supra,* 224 U.S. at 412.

The likelihood that the SEC will adopt such an order seems remote. Until October 1974 it had con-

[28] See II Loss, *Securities Regulation*, p. 1179, n. 29 (2d ed. 1961).

ducted only two proceedings under Section 19(b)[29] and it has never indicated in any formal action that fixed commissions are necessary to the scheme of the Act. It has instead moved steadily in the direction of considering administrative abolition of the fixed commission rate system (see n. 23, *supra*), culminating in its announcement January 23, 1975, of Rule 19b–3, prohibiting fixed rates to the public as of May 1, 1975, and to members and associated members (floor brokerage) as of May 1, 1976.[30]

Moreover, the *Silver* test is applicable to action of the Commission as well as of the courts. Most of the exchange rules subject to Section 19(b) do not affect

---

[29] The first was *In the Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270. In that case, the Commission abrogated a New York Stock Exchange rule designed to suppress trading on regional exchanges. It held that the fostering of competition among exchanges was one of the purposes of the Securities Exchange Act. The second involved institutional membership in exchanges. On January 16, 1973, the Commission adopted Rule 19b–2, which ordered every exchange to limit membership to those whose "principal purpose" is the conduct of a "public securities business." Securities Exchange Act Release No. 9950, January 16, 1973. Adoption of the Rule followed several requests, both informal and formal, by the SEC to the exchanges to restrict "institutional membership" and resistance by certain of the exchanges, particularly the Philadelphia-Baltimore-Washington Exchange, to these requests. The Rule was challenged by the PBW Exchange in the Third Circuit, but the petition was dismissed on jurisdictional grounds. See *PBW Stock Exchange, Inc.* v. *Securities and Exchange Commission*, *supra*. Judicial challenge to the Rule is currently continuing in the District Court. *PBW Stock Exchange, Inc.* v. *Securities and Exchange Commission*, Civ. Act. No. 74–1198 (E. D. Pa.).

[30] Securities Exchange Act Release No. 11203, January 23, 1975.

competition at all. But competition must be considered by the Commission in weighing the impact on the investing public of exchange rules which do affect competition, because preservation of the competitive free enterprise system is a fundamental national policy. Thus, in barring fixed rates, the SEC said that its "conclusions are consistent with the American tradition of reliance upon free competition to determine prices and allocate resources, as reflected by the public policy embodied in the antitrust laws."[31] See also *In the Matter of the Rules of the New York Stock Exchange,* 10 S.E.C. 270.

This Court has noted that the antitrust laws are the appropriate starting place for determination of the public interest, and that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." *Federal Maritime Commission* v. *Svenska Amerika Linien,* 390 U.S. 238, 245–246. Accord *Gulf States Utilities Co.* v. *Federal Power Commission,* 411 U.S. 747; *Denver & R. G. W. R. Co.* v. *United States,* 387 U.S. 485; *Otter Tail Power Co.* v. *United States, supra; California* v. *Federal Power Commission, supra.*

Since the purpose of the Securities Exchange Act is to protect investors, not to insulate members of exchanges and dealers in over-the-counter markets from competition, the SEC must apply the *Silver* test in the

[31] Securities Exchange Act Release No. 11203, *supra,* at p. 24.

same manner as a court. Exchange rules which have a significantly adverse effect on competition—as for example fixed commission rates or rules denying access to the exchange—are seriously anticompetitive. Where this is so, it must be presumed that the rule operates to the detriment of the investing public and can therefore be deemed by the SEC to be "necessary or appropriate" under Section 19(b) only to the extent such a restriction on competition is necessary to the operation of the Act and no more restrictive than necessary. The SEC and the courts are thus required to apply essentially the same standard to self-regulatory activities which are seriously anticompetitive, and SEC's recent prohibition of fixed rates reflects this approach.

6. Fixed commission rates as a keystone of the marketing system

The court of appeals also appears to have assumed that the fixed commission rate system was essential to the functioning of securities markets, since it characterized the rate structure as "the keystone of the economic viability of the brokerage industry" (Pet. App. 44). This statement, made without the kind of evidentiary record required by *Silver* (see discussion, *supra,* pp. 17–26), is unsupported.

It is a view rejected by the SEC itself, since the Commission has ordered the prompt abolition of fixed commission rates; and by the legislative bodies which have considered the question. The Senate has adopted legislation which would abrogate fixed rates unless exchanges granted membership to institutional inves-

tors (S. 470, 93d Cong.; see S. Rep. No. 93–187, *supra,* at p. 3), and the House Committee on Interstate and Foreign Commerce also reported legislation which would require abolition of a system it characterizes as unreasonable (H.R. 5050, 93d Cong.; see H. Rep. No. 93–1476, *supra,* at pp. 46–48). Similar conclusions were reached by the House and Senate Studies of the securities industry (*supra,* n. 25).

Moreover, none of the economic factors which would characterize a regulated monopoly pricing system is reflected in the scheme of the Act. Exchange members have no statutory duty to serve all members of the public without discrimination; and the nature of the service offered, operating costs, firm size, and comparative efficiencies between firms vary widely. Because cost data for various kinds of services characteristic of public utility rate making are not available, the SEC has never attempted to apply traditional rate of return criteria to exchange rates.[32] See Securities Exchange Act Release No. 11,203, *supra,* pp. 9–10, 28–30.

Instead, it has advised Congress that no general rate

---

[32] See, *e.g.*, letter of SEC Chairman Casey to Chairman Harrison A. Williams, Jr., Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, December 3, 1971, Hearings before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, on S. 3169, Stock Exchange Commission Rates, 92d Cong., 2d Sess., pp. 30–32; and letter of SEC Chairman Cook to Chairman Harrison A. Williams, Jr., Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, April 10, 1973.

structure can be devised.[33] The only sense in which fixed commission rates have been a "keystone" is that they have been in effect since the New York Stock Exchange was established under a buttonwood tree in 1792. This hardly indicates that Congress intended to authorize them in the Securities Exchange Act, and as we have seen, nothing in the history of that Act reflects a purpose by Congress to endorse this profitable, but hardly necessary practice.[34]

The court of appeals concluded that because the fixed commission rate structure is so ancient, the consequence of introducing competitive rates would be the failure of a number of inefficient brokerage firms (Pet. App. 47). It noted that SEC studies show "that the exchanges have operated for a long time under cartelized commission rates, which exceed those which would have been charged by firms of efficient scale" and suggested that "[m]easured withdrawal could avoid the loss of * * * investor funds by allowing failing brokers to 'exit by orderly merger or liquidation rather than by bankruptcy.'" *Ibid.* This observation, we submit, confirms the wisdom of applying the *Silver* test.

---

[33] Testimony of Commissioner Loomis, Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 5050 and H.R. 340, Securities Exchange Act Amendments of 1973, 93d Cong., 1st Sess., Part 2, p. 482.

[34] See Baxter, *supra*, 22 Stan. L. Rev. at p. 676. Prof. Baxter observes that in 1792 "the ink was hardly dry on Adam Smith's seminal treatise advocating the social desirability of free and competitive markets * * *" (*ibid.*).

If, as the SEC now has indicated, fixed commission rates are inconsistent with the Securities Exchange Act, then the only ground for permitting them to continue for even a brief time is because a transition period of some kind is necessary for investor protection. Under the *Silver* test, such a transition period might be justified on a proper record. The fashioning of equitable relief to allow such a transition, if fixed commission rates are found to violate the antitrust laws, would be consistent with both traditional doctrines of antitrust relief and equitable principles. This Court has long recognized the powers of a court of equity to fashion relief in a flexible manner taking practical considerations relating to the public interest into account. Cf. *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316; see also *Hartford-Empire Co.* v. *United States*, 323 U.S. 386; and *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333, 419 (S.D. N.Y.).

Since private antitrust remedies include damages, as well as equitable relief, there remains a question of retroactive damage liability. Whether such liability should be imposed in view of the long history of reliance by the exchanges on the absence of any challenge to their price fixing practices from 1792 to the decade of the 60's is a question which would have to be considered if this or other cases, after application of the *Silver* test, should result in a determination of liability and reach the issue of damages. Given the long history of fixed commission rates, the absence of any challenge to them by anyone until after the 1963

Special Study (n. 23, *supra*) and the relative recentness of *Silver*, there may be equities justifying prospective application of any decision holding commission rate fixing illegal under the antitrust laws, except as to the particular plaintiffs involved. Cf. *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14; *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105–109. But these must be considered on a full record after *Silver* has been applied.

7. "Chilling" exchange self-regulation

The SEC has argued (SEC Memorandum as Amicus Curiae, p. 8) that application of the *Silver* test will chill the willingness of the exchanges to engage in self-regulatory activity, and affect the manner in which it exercises its supervisory authority. *Silver*, however, rejected the Second Circuit's "chilling" analysis in that case, and its reiteration here is simply a reversion to a rejected standard. Moreover, insofar as the SEC claims exclusive jurisdiction, it would be claiming an unprecedented power to grant exemption from the antitrust laws without any statutory indication that the Congress intended to delegate to it the power to immunize.[35]

To construe the Securities Exchange Act so that the antitrust laws were applicable only where the Commission affirmatively disapproves exchange rules would stand on its head this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference, supra*. *Carnation* applies *a fortiori* here, where the SEC is

[35] See *United States* v. *Borden Co.*, *supra*; *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 350–355.

not authorized to approve rate fixing agreements prior to implementation, much less to immunize them. Moreover, such a construction would overrule *Ricci's* authoritative interpretation of *Silver* and undermine the salutary principle of *Silver* itself.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
Attorney.

JANUARY 1975.

APPENDIX

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, are as follows:

NECESSITY FOR REGULATION AS PROVIDED IN THIS TITLE

SECTION 2. For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchange and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of

567-303—75——6

credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted througout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet

such emergencies the Federal Government is put to such great expense as to burden the national credit.

* * * * *

TRANSACTIONS ON UNREGISTERED EXCHANGES

SECTION 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

REGISTRATION OF NATIONAL SECURITIES EXCHANGES

SECTION 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any

amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

* * * * *

OVER-THE-COUNTER MARKETS

* * * * *

SEC. 15A [As added in 1938 by the Maloney Act, 52 Stat. 1070 (15 U.S.C. 78o–3)]. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below, specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules

and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section;

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section;

(3) the rules of the association provide that any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) of this subsection: *Provided*, That the rules of the association may restrict membership in such association on such specified geographical basis, or on such specified

basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section;

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if (1) such broker or dealer, whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade, or (B) is subject to an order of the Commission denying or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or (C) by his conduct while employed by, acting for, or directly or indirectly controlling or controlled by, a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B)

which is in effect with respect to such broker or dealer;

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs;

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration;

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fixed minimum rates of commissions, allowances, discounts, or other charges;

(8) the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules;

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and the denial of membership to any broker or dealer seeking membership therein. In any proceeding to determine whether any member shall be disciplined, such rules shall require that specific charges be brought; that such member shall be notified of, and be given an opportunity

to defend against, such charges; that a record shall be kept; and that the determination shall include (A) a statement setting forth any act or practice in which such member may be found to have engaged, or which such member may be found to have omitted, (B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation, (C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade, and (D) a statement setting forth the penalty imposed. In any proceeding to determine whether a broker or dealer shall be denied membership, such rules shall provide that the broker or dealer shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial is based; and

(10) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

* * * * *

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall re-

voke the registration of such affiliated securities association.

* * * * *

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order, unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k)(1) The Commission is authorized by order to abrogate any rule of a registered securities association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a

reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to: (1) The basis for, and procedure in connection with, the denial of membership or the disciplining of members; (2) the method for adoption of any change in or addition to the rules of the association; (3) the method of choosing officers and directors; and (4) affiliation between registered securities associations.

(1) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section;

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any

rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation;

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

* * * * *

POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

SECTION 19. (a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not

exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the

evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the rules of national securities exchanges with respect to the classification of members, the methods of election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

* * * * *

EFFECT ON EXISTING LAW

SECTION 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may ~~exist~~ at law or in equity; but no person permitted to maintain a suit for damages under

the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

The pertinent provisions of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et. seq.* are as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or con-

spire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent provisions of the Clayton Act, 38 Stat. 731, 737, 15 U.S.C. 15, 26, are as follows:

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *

U.S. GOVERNMENT PRINTING OFFICE: 1978